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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-868

ADOLPH COORS COMPANY, a corporation,

Petitioner,

vs.

R.E. SPRIGGS CO., INC., a California corporation, and PHOEBE SPRIGGS, Successor-in-interest to the Estate of Ralph E. Spriggs, Deceased,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California for the Second Appellate District.

RESPONDENTS' BRIEF IN OPPOSITION.

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RESPONDENTS' BRIEF IN OPPOSITION.

Respondents R.E. Spriggs Co., Inc., a California corporation, and Phoebe Spriggs, successor-in-interest to the Estate of Ralph E. Spriggs, deceased, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the decision of the California Court of Appeal for the Second Appellate District. That opinion is reported at 94 Cal. App. 3d 419, 156 Cal. Rptr. 738.

Jurisdiction.

Spriggs has no quarrel with the recital of dates contained in Coors' Petition. However, none of the questions presented by Coors raises a substantial federal question. They are purely questions of state law. Two of them were not raised in a timely fashion.

1. Coors' contention that it was denied due process because the California courts applied "offensive" collateral estoppel to judgments from "different time periods in different geographic markets" is not supported by this record. The Court of Appeal held: ". . . [T]he issues involved in this case are precisely those litigated and decided in *F.T.C.* and *Copper.*" *R.E. Spriggs Co., Inc. v. Adolph Coors Co.*, 94 Cal. App. 3d 419, 429, 156 Cal. Rptr. 738, 743 (1979) ("*Spriggs II*").[1]

Coors really seeks only review of that determination. Coors concedes that its contention of a denial of due process "rests upon erroneous application of collateral estoppel based on two federal judgments which did not involve identical issues." (Pet. 11). The question of whether the same issues were involved in the state court suit and the two previous federal judgments is not an appropriate matter for review by this Court. This is a question purely of state law. There is no substantial federal question.

Parklane Hosiery Company, Inc. v. Shore, 439 U.S. 322 (1979), held that the offensive use of collateral estoppel does not violate due process in a federal setting. Its application under state law, using the same criteria,[2] does not violate due process either.

Any federal question of denial of due process has not been timely raised. Although the issue of the collateral estoppel effect of the judgments was argued in the trial court and before the Court of Appeal, due process and the Fourteenth Amendment were first mentioned by Coors in its Petition for Rehearing by the Court of Appeal (Pet. 8, App. 113-14). California law is that points not previously argued will not be considered where raised for the first time in a petition for rehearing. *United Services Automobile Ass'n v. United States Fire Ins. Co.*, 36 Cal. App. 3d 765, 773, 111 Cal. Rptr. 595, 600 (1973); *Smith v. Crocker First National Bank of San Francisco*, 152 Cal. App. 2d 832, 837, 314 P.2d 237, 241 (1957); *County of Imperial v. McDougal*, 19 Cal. 3d 505, 513, 564 P.2d 14, 19, 138 Cal. Rptr. 472, 477 (1977). Neither the Court of Appeal nor the California Supreme Court has passed on the due process question.

Failure to raise a federal question in accordance with state procedures bars review of the issue by this Court. *See* 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure ("Wright & Miller") § 4022 at pp. 700-01 (1977 and Supp. 1979); *Michigan v. Tyler*, 436 U.S. 499, 512 n. 7 (1978); *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975); *Edelman v. California*, 344 U.S. 357, 358-59 (1953); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935).

2. There is no conflict between the decision of the Court of Appeal and *Continental T.V., Inc. v. G.T.E. Sylvania, Inc.*, 433 U.S. 36 (1977) ("*Sylvania*"). *Sylvania* involved only naked territorial restraints. The court here found that Coors' territorial restraints ancillary to a price fixing scheme violated the California antitrust laws—the Cartwright Act (Cal. Business & Professions Code, §§ 16700-16760). The California Court of Appeal applied collateral estoppel to the *fac-*

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[1]The references to *F.T.C.* and *Copper* are to *Adolph Coors Co. v. F.T.C.*, 497 F.2d 1178 (10th Cir. 1974) ("*F.T.C.*"), and *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934 (5th Cir. 1975) ("*Copper Liquor*"), respectively.

[2]The Court of Appeal applied the standards of Restatement of Judgments §88 (Tent. Draft No. 2, 1975) which were approved by this Court in *Parklane Hosiery*, 439 U.S. at 330. *See Spriggs II*, 94 Cal. App. 3d at 431, 156 Cal. Rptr. at 745.

tual determinations of the two federal judgments that Coors' distribution system included territorial restraints ancillary to a price fixing scheme. It did not apply the *law* of *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) ("*Schwinn*"). The coverage of the California antitrust laws to activities in California is a pure state law question.

And the Court of Appeal's standards for application of collateral estoppel is not only a question of pure state law but is entirely consistent with this Court's recent pronouncements regarding federal collateral estoppel in *Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322 (1979), and *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971).

3. Whatever section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), means as applied to federal suits asserting violations of the Clayton Act or the Sherman Act, it is simply irrelevant here for this suit is under the California antitrust statute. The collateral estoppel effect which California courts will give to administrative proceedings which are adjudicatory in nature is a question of purely state law and should not be reviewed by this Court.

This question also was not raised in accordance with state procedures. The first mention of this issue was in the Petition for Rehearing by the Court of Appeal (Pet. 6, App. 120-23). Neither the Court of Appeal nor the California Supreme Court has ruled on it.

Moreover, the Court of Appeal applied collateral estoppel to the findings in *Copper Liquor* that Coors engaged in territorial restraints which were ancillary to price fixing. This was a judgment after a jury

verdict, not an F.T.C. order under section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The collateral estoppel effect of the factual determinations in *Copper Liquor* alone is sufficient to sustain the decision of the Court of Appeal. Accordingly, the question raised by Coors is not within the jurisdiction of this Court.

Questions Presented.

As pointed out in the jurisdictional statement, the questions raised by petitioner are not rooted in the record of this case, do not present any substantial federal question, and are questions of state law which are inappropriate for review by this Court.

Statement of the Case.

This case does not involve naked territorial restraints of the *Schwinn* and *Sylvania* mode. The California Court of Appeal held that Coors' territorial restraints which were ancillary to a price fixing scheme violated California antitrust law—the Cartwright Act. It applied California collateral estoppel law to give effect to two previous federal *factual* findings in two prior final judgments against Coors to the effect, as stated by the Court of Appeal; "Unquestionably, Copper Liquor and F.T.C. decided *as factual matters* that Coors' territorial restraints were ancillary to a price fixing scheme." 94 Cal. App. 3d at 428, 156 Cal. Rptr. at 743 (emphasis in original).

The Court of Appeal determined that petitioner Coors, a Colorado brewery which markets its beer in eleven western states through a wholesale distribution network of 167 distributors had, on two prior occasions,

fully litigated the factual circumstances surrounding its multi-state wholesale distribution scheme which imposed territorial restraints on the wholesale distributors ancillary to price fixing by Coors at the wholesale and retail levels. The Court of Appeal, by the application of the doctrine of collateral estoppel, determined in the case of Spriggs (one of the 167 distributors) that there was ". . . no unfairness in denying Coors a third opportunity to litigate the legality of territorial restrictions designed (by Coors) as part of a price fixing scheme", stating:

> In sum, we hold that the trial court erred in failing to find as a matter of law that the factual circumstances surrounding Coors' imposition of territorial restraints upon Spriggs were determined in *F.T.C.* and *Copper Liquor,* and that Coors was barred from relitigating in this case the question whether it imposed territorial restraints upon Spriggs in order to facilitate a price fixing scheme.

94 Cal. App. 3d at 431, 156 Cal. Rptr. at 745. This decision was based upon an examination of the record which clearly established that the factual issues which Coors had previously litigated and lost were identical to the issues in the case at bar.

The focus of the Court of Appeal was sharp and its conclusion positive, the court stating:

> At trial, Spriggs introduced evidence that the distributorship contracts involved in *F.T.C.* and *Copper Liquor* were identical in substance to the Spriggs/Coors agreements and that Coors' manner of enforcement thereof—including its attempts at persuading distributors to adhere to its pricing

> policies—was consistent throughout the relevant period.
>
> * * *
>
> What we are interested in—and what the trial court should have been interested in—are the factual findings of *F.T.C.* and *Copper Liquor* that the territorial restrictions were ancillary to an illegal price fixing scheme.
>
> * * *
>
> As noted above, the issues involved in this case are precisely those litigated and decided in *F.T.C.* and *Copper.*

94 Cal. App. 3d at 427-29, 156 Cal. Rptr. at 742-43.

REASONS WHY THE WRIT SHOULD BE DENIED.

1. There Is No Substantial Federal Due Process Question Raised in This Case.

Petitioner Coors submits that application of the doctrine of collateral estoppel in this case served to deny it due process of law by depriving it of a chance to litigate the liability issue presented in this case. Such a sweeping contention is both at variance with the proceedings in this case, in which liability was in issue, and with the application of collateral estoppel sanctioned by the California Court of Appeal.

Two earlier courts had reached *factual* determinations that Coors had territorial restrictions ancillary to a price fixing scheme. These factual determinations, together with evidence presented by Spriggs at trial, compelled a conclusion that *as a matter of fact* Coors acted to fix prices and restrict territories of its distributors. Coors was afforded ample opportunity to differentiate between the facts of the other cases and this one, as well as to dispute the evidence presented at trial. Further, Coors had fully litigated these issues in both *F.T.C.* and *Copper Liquor*. Spriggs suggests that due process does not require more in this case.

Coors urges that collateral estoppel should not have been applied in this case because there was not identity of issues in the prior cases. In essence, this argument reduces to whether the factual distinctions which Coors attempts to draw between *F.T.C.*, *Copper Liquor*, and this case are meaningful. Spriggs asserted that they were not. The Court of Appeal agreed.

Coors' point is only that it believes that the Court of Appeal was wrong. It concedes that what it calls a denial of due process "rests upon" what it

calls an "erroneous application of collateral estoppel" (Pet. 11). Coors presents selective portions of the record in this case, its contentions in various briefs below, and selected portions of the record in *F.T.C.* and *Copper Liquor* in support of its argument that the Court of Appeal was wrong. Attached as an appendix to this brief is a portion of the Brief in Opposition to Coors' Petition for Hearing in the California Supreme Court. It shows the overwhelming support in the record for the Court of Appeal's conclusion. The evidence produced at trial established that Coors' marketing practices were uniform throughout the eleven states in which beer was distributed during the period relevant to this lawsuit. These policies were maintained consistently through the period 1960-1970.

But the point is not whether the Court of Appeal was right or wrong. Coors would ask this Court to review the record in *F.T.C.*, review the record in *Copper Liquor*, review the record in this case, decide what issues were decided in *F.T.C.* and *Copper Liquor*, determine the issues involved in this case based upon pretrial pleadings and trial, and then determine the California law of collateral estoppel. Spriggs submits that this is not an appropriate function of this Court.

Even Coors concedes that due process requires only "a meaningful opportunity to be heard" (Pet. 11). We submit that its hearing in the trial court, the California Court of Appeal, its Petition for Rehearing in that court, and its Petition for Hearing in the Supreme Court of California have provided that opportunity.

If the issue of the applicability of collateral estoppel is, in the terms of *Blonder-Tongue Laboratories, Inc.*

v. University of Illinois Foundation, 402 U.S. 313, 328 (1971): ". . . whether it is any longer tenable to afford a litigant more than one full and fair opportunity for the judicial resolution of the same issue", then the jury verdict in *Copper Liquor,* the decision of the Federal Trade Commission, two appeals to the United States Court of Appeal, and a petition for certiorari which was denied is at the minimum one full and fair opportunity for judicial resolution.

The question of whether issues are identical for the purpose of applying the California law of collateral estoppel is not a substantial federal due process question.

2. The California Court of Appeal Did Not Apply the Law of Schwinn; It Rather Applied the Doctrine of Collateral Estoppel to the Factual Determinations in F.T.C. and Copper Liquor.

Coors further maintains that the effect of applying collateral estoppel in this case was to embrace the now defunct per se rule regarding territorial restraints announced by this Court in *Schwinn.* Coors cites *Del Rio Distributing, Inc. v. Adolph Coors Co.,* 589 F.2d 176 (5th Cir.) *cert. denied,* ..... U.S. ....., 100 S.Ct. 80 (1979) ("*Del Rio*"); and *Adolph Coors Co. v. A & S Wholesalers, Inc.,* 561 F.2d 807 (10th Cir. 1977) ("*A & S*") in support of the proposition that earlier cases relying on the *Schwinn* doctrine have been refused collateral estoppel effect in light of this Court's decision in *Sylvania.*

This argument clearly misses the point that collateral estoppel was applied as to the *factual,* not *legal,* conclusions of *F.T.C.* and *Copper Liquor.*

The court below correctly made the distinction:

> Unquestionably, *Copper Liquor* and *F.T.C.* decided as *factual matters,* that Coors' territorial restraints were ancillary to a price fixing scheme. This makes irrelevant Coors' principal point that both *F.T.C.* and *Copper Liquor* were based upon the now defunct doctrine of *United States v. Arnold, Schwinn & Co.* (1967) 388 U.S. 365, 379 [18 L. Ed. 2d 1249, 1260, 87 S. Ct. 1856], that under certain circumstances territorial restrictions alone were illegal per se. *Schwinn* was, of course, overruled in *Continental T.V., Inc., v. GTE Sylvania, Inc.,* (1977) 433 U.S. 26, 57-58 [53 L. Ed. 2d 568, 584-585, 97 S. Ct. 2549], but the legal demise of the *Schwinn* rule is beside the point. What we are interested in—and what the trial court should have been interested in—are the factual findings of *F.T.C.* and *Copper Liquor* that the territorial restrictions were ancillary to an illegal price fixing scheme. Price fixing, of course, has been illegal per se for decades and still is. (See. e.g., *Goldfarb v. Virginia State Bar* (1975) 421 U.S. 773 [44 L. Ed. 2d 572, 95 S. Ct. 2004]; *United States v. General Motors Corp.,* (1966) 384 U.S. 127, 147 (16 L. Ed. 2d 415, 427, 86 S. Ct. 1321] and cases cited therein.)

94 Cal. App. 3d at 428, 156 Cal. Rptr. at 743 (emphasis in original).

It has long been the law in California that collateral estoppel may apply to factual determinations in a case without reference to the legal questions involved in that case. *See Spriggs II,* 94 Cal. App. 3d at 429,

156 Cal. Rptr. at 743. This is a matter of pure state law.

Coors' failure to grasp this fundamental distinction has infected its arguments at each level of this appeal. The judgment of the Court of Appeal was not based upon an application of *Schwinn*, but rather of a more basic and unquestionably well settled principle of anti-trust law: Territorial restraints ancillary to an illegal price fixing scheme are per se illegal.

3. There Is No Conflict Between This Case and Sylvania.

Coors' next point is that the California Court of Appeal rejected the rule established by this Court in *Sylvania*. The Court of Appeal carefully considered the teachings of *Sylvania* and the demise of *Schwinn*.

This case involved more than just naked territorial restraints on distributors. Coors was engaged in a complex system of resale price maintenance, utilizing its economic leverage against wholesalers and retailers, of which territorial restraint was only a part. This fact must be contrasted with *Sylvania* in which this Court noted: "As in *Schwinn*, we are concerned here only with *nonprice* vertical restraints. The per se illegality of *price* restrictions has been established firmly for many years and involves significantly different questions of analysis and policy." 433 U.S. at 51 n. 18 (emphasis added).

The Court of Appeal held:

> In sum, we hold that the trial court erred in failing to find as a matter of law that the factual circumstances surrounding Coors' imposition of territorial restraints upon Spriggs were

> determined in *F.T.C.* and *Copper Liquor*, and that Coors was barred from relitigating in this case the question whether it imposed territorial restraints upon Spriggs in order to facilitate a price fixing scheme.

94 Cal. App. 3d at 432, 156 Cal. Rptr. at 745.

There is no conflict.

4. There Is No Conflict With Decisions of the Federal Courts of Appeals.

Coors contends that the decision of the California Court of Appeal conflicts with *Del Rio* and *A & S*, which decisions refused to grant collateral estoppel effect to the *Copper Liquor* and *F.T.C.* cases. The basis for the decisions in *Del Rio* and *A & S* was that the *legal foundation* for the earlier cases, the *Schwinn* rule on territorial restraints, had been undermined by this Court's *Sylvania* ruling.

The opinion in *Del Rio* ignored a salient point of *Copper Liquor* in its handling of the case—namely the finding of price restraints in the Coors marketing operations. So important was this finding that Judge Gee, concurring in *Copper Liquor*, would have rested the entire case on price fixing without inquiry into the territorial restrictions. 506 F.2d at 955 (Gee, J., concurring specially). It is manifest in the *Del Rio* opinion that the Court of Appeal never considered price restraints. Similarly, the *Del Rio* court failed to recognize the voluminous findings of the Federal Trade Commission which were affirmed in the *F.T.C.* case, and relegated its only reference to the case to a footnote. It is ironic that Coors should now complain that *Del Rio* received similar attention in the opinion below.

Coors mentions this Court's denial of *Del Rio's* petition for certiorari, ... U.S. ....., 100 S.Ct. 80 (1979) (Pet. 12), as though this fact should impart a special blessing on Coors' position. It is however, firmly established that denial of such a petition constitutes no opinion of this Court on the merits of a particular case, 16 Wright & Miller § 4004 at p. 510; *Hughes Tool Co. v. Trans World Airlines,* 409 U.S. 363, 365 n. 1 (1973); *Brown v. Allen,* 344 U.S. 443, 489-97 (1953) (opinion of Frankfurter, J.); *Maryland v. Baltimore Radio Show, Inc.,* 338 U.S. 912 (1950) (opinion of Frankfurter, J.). This Court's refusal to review *Del Rio* should assume no significance in regard to the present petition.

In *A & S,* the Tenth Circuit was solely concerned with territorial restraints and voiced no opinion regarding territorial restraints ancillary to price fixing. It appears from the opinion that A & S Wholesalers sought to have *F.T.C.* applied as to naked territorial restraints and have the per se rule of *Schwinn* be conclusive. The court in *A & S* noted that *Sylvania* was dispositive of the issues raised in the *A & S* appeal relating to territorial restraints—it remanded other issues for further proceedings. 561 F.2d at 810. The Tenth Circuit did not reach the issues involved in this case and, therefore, the *A & S* decision was not in conflict with the opinion of the California Court of Appeal.

Since neither *Del Rio* nor *A & S* dealt with a contention that Coors' marketing system constituted territorial restraint ancillary to a price fixing scheme, those decisions should not have been followed by the court below.

Even if there were any conflict, there is no requirement that the California law of collateral estoppel be identical with the federal law. Resolving conflicts between the circuits on matters of federal law is markedly different from being the final appellate court for purely state law questions.

5. The Collateral Estoppel Effect Accorded an F.T.C. Order in a State Antitrust Action Is Not an Issue Which This Court Should Decide.

Coors argues that the F.T.C. Cease and Desist Order, which was affirmed in *F.T.C.,* should not have been given collateral estoppel effect in this case because such an order is not a final judgment within the meaning of section 5(a) of the Clayton Act, 15 U.S.C. § 16(a). Were this case initiated in federal court under the Sherman and Clayton Acts, the issue would be relevant. In the present case, it is a disingenuous effort to introduce an irrelevant issue.

This litigation arose under the Cartwright Act, which is similar, but not identical, to the federal antitrust laws. The Cartwright Act has no provision comparable to Clayton Act section 5(a) and there is no authority for the proposition that the rule of section 5(a) has in some way been engrafted onto the California statute. Accordingly, decision of this issue was through resort to general principles of collateral estoppel applied by the California courts, and not to federal authority on a specific statute unrelated to the state law. *Spriggs II,* 94 Cal. App. 3d at 429-31, 156 Cal. Rptr. at 743-45. Spriggs submits that this issue presents a question of purely state law which is not subject to review by this Court. *See* 16 Wright & Miller § 4019 at

pp. 661-62; *Mullaney v. Wilbur,* 421 U.S. 684, 691 (1975); *Murdock v. Memphis,* 87 U.S. (20 Wall.) 590 (1875).

Moreover, the Court of Appeal rested its opinion on the factual determination in *Copper Liquor* as well as the F.T.C. Cease and Desist Order. The decision in *Copper Liquor* was supported by evidence presented in that case which was independent of the F.T.C.'s findings. 506 F.2d at 946-47. Accordingly, even if Coors' contention on this point were meritorious, the decision below could still rest on the basis of *Copper Liquor* and remain undisturbed by a reversal as to application of the F.T.C. findings. This is an independent non-federal ground for the opinion of the Court of Appeal. The writ should not be granted.

Conclusion.

For these reasons the petition for a writ of certiorari to review the decision below should be denied.

Respectfully submitted,

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APPENDIX.

Excerpts from Spriggs' Brief in Opposition to Petition for Hearing in the Supreme Court of California.

I

INASMUCH AS THE COURT OF APPEALS—FROM A COMPELLING RECORD—CORRECTLY DETERMINED THAT THE FACTUAL ISSUES (COORS' TERRITORIAL RETRAINTS AS ANCILLARY TO A PRICE FIXING SCHEME) WERE IDENTICAL IN *F.T.C.*, *COPPER LIQUOR* AND *SPRIGGS*, THERE WAS NO "NOVEL" OR "UNPRECEDENTED" OR "CONFLICTING" APPLICATION OF THE DOCTRINE OF COLLATERAL ESTOPPEL

Coors' initial ground for hearing presupposes that the issues in *F.T.C.*, *Copper Liquor* and *Spriggs* were not identical. From that claimed lack of identical issues Coors then argues that the Court of Appeals applied the doctrine of collateral estoppel in some novel or unprecedented fashion so as to preclude Coors from litigating for a third time the question of whether its territorial restraints were ancillary to its price fixing scheme.

The conclusion of the Court of Appeals at Appendix, page 10:

> "Unquestionably *Copper Liquor* and *F.T.C.* decided, *as factual matters,* that Coors' territorial restraints were ancillary to a price fixing scheme. . . ." (Emphasis the Court's.)

finds its genesis in the explicit holdings in *F.T.C.* and *Copper Liquor*. In *F.T.C.* the opinion states:

"The Commission held that Coors vigorously enforces its territorial restrictions and that it has engaged in unlawful price fixing which is: . . . strong grounds for presuming that the most injurious effects of vertical territorial divisions may be operative, and, therefore, for holding the entire arrangement of territories with price fixing illegal per se."

In *Copper Liquor* the opinion states:

". . . the restrictions Coors imposed necessarily facilitated price fixing . . . Coors' restraints were ancillary to an illegal price fixing scheme."

This issue of the brewery-imposed territorial restraints ancillary to the brewery-imposed price fixing scheme and Spriggs' explicit contention are clearly set forth in the Joint Pre-trial Statement of the parties and is set forth in the Opinion of the Court of Appeals (App. p. 2):

". . . the Coors-Spriggs written agreements violated the Act 'by reason of the territorial limitations therein, *and because the control afforded to Coors by such agreements in combination with other agreements between Coors and Spriggs resulted in illegal price fixing,*' and, further, that such agreements 'resulted in territorial limitations, *price fixing* and conspiracy to exclude Spriggs from selling beer in Los Angeles County, all in violation of the Cartwright Act.'" (Emphasis the Court's.)

A. *Coors' Claim of Dissimilar Issues Is Clearly Refuted by Reference to the Facts Recited in the Opinions in F.T.C. and Copper Liquor and the Court of Appeals' Resumé of Facts Established in Spriggs.*

The Court of Appeals, upon a thorough examination of the *Spriggs* trial record, concluded:

". . . As noted above, the issues involved in this case are precisely those litigated and decided in *F.T.C.* and *Copper.*" (App. p. 12.)

To demonstrate the correctness of that determination, we have attached to this brief (as Appendix A) a factual resumé from the opinions of the Court of Appeals in *Spriggs* and the Federal Courts of Appeal in *F.T.C.* and *Copper Liquor,* which resumé confirms the identity of the issues.

It is clear that the judicial inquiry in each proceeding encompassed the brewery distribution scheme as it operated in its 11-state marketing area (including California and Texas) from manufacturer through wholesaler and retailer. Each tribunal identified and examined the brewery's territorial controls and the brewery's pricing practices and found a common policy to establish "pricing integrity", which means that a certain level of profit is allowed by the brewery on each level of resale (distributor through retailer), and Coors, in the enforcement of that policy, fixed prices.

In addition to the demonstration of the identity of issues by direct and specific reference in *Spriggs, F.T.C.* and *Copper Liquor,* we point out that the commonality of distributorship agreements with territorial restraints, the uniform application of the Policy Manual and the Coors pricing policies to all distributors, wherever located, during the time span covered in *F.T.C., Copper Liquor* and *Spriggs,* was established in *Spriggs* through documentary evidence and direct testimony from the same brewery officers who also testified in *F.T.C.* and *Copper Liquor.*

The Court of Appeals therefore correctly concluded:

> "At trial, Spriggs introduced evidence that the distributorship contracts involved in *F.T.C.* and *Copper Liquor* were identical in substance to the Spriggs/Coors agreements and that Coors' manner of enforcement thereof—including its attempts at persuading distributors to adhere to its pricing policies—was consistent throughout the relevant period." (App. p. 9.)

In *Spriggs,* the trial record established that the Policy Manual to which specific reference was made in *F.T.C.* —by its very terms "will apply alike to all Coors distributors." (Ex. C.)

Testimonial evidence of brewery officers confirmed this constant and identical application throughout the ten-year period, 1960-1970, which encompasses *Spriggs, F.T.C.* and *Copper Liquor* (R.T. 185, 186, 187, 225, 263, 264 and 265). From this evidentiary record it is clear and uncontradicted that the brewery distribution system of territorial restraints and the brewery price-fixing policies and actions applied to all distributors in the 11-state marketing area, constantly through the period 1960-1970, and that is the period which encompasses *Spriggs, F.T.C.* and *Copper Liquor.*

Notwithstanding the brewery's contentions of dissimilar issues, the brewery does not dispute or challenge the factual resumé in the opinion of the Court of Appeals nor the evidentiary record that its territorial restraints and price-fixing activities impacted all distributors at least during the period 1960-1970. Indeed, in its trial brief Coors then admitted:

> "The decision of the FTC which Coors appealed was *not* that Coors' vertical territorial restrictions were always illegal, but only that such restrictions were prohibited *because of their effect on prices.*" (Emphasis the brewery.) (at page 5)

As to *Copper Liquor,* the brewery then candidly admitted:

> "Like the *FTC* case, however, this case also involved the use of the restrictions to unlawfully affect prices. As noted in Coors' trial brief at page 15, it was the use of the territorial limitations to facilitate resale price maintenance that rendered them *per se* illegal. . . ."

Now, before this Court, Coors claims dissimilarity.

B. *Coors' Claim of Dissimilar Issues is Refuted by Reference to Its Own Description of Its Wholesale Distribution Scheme of Territorial Restraints.*

Beyond the affirmative showing of identity of issues covered in the preceding topic, we wish to bring to the attention of this Court Coors' own prior statements to this Court and the Court of Appeals which belie its current claim that its wholesale distribution scheme as examined in *F.T.C.* and *Copper Liquor* involved "different conduct" in a "different state", and at a "different time".

In the first appeal (2nd Civil Nos. 41861 and 40228), Coors, in an effort to convince the Supreme Court in its Petition for Hearing that California and Spriggs were part and parcel of a common and identical multi-state distribution system (in order to support its interstate character), then claimed:

> "The distribution system applies to all of Coors distributors in the eleven states in which Coors beer is marketed *and any consequences arising*

from its use affect all of these areas." (Emphasis added.) (Coors' Petition for Hearing, at page 8.)

Earlier, in the same Petition, Coors had stated to the Supreme Court:

> "These restrictions were imposed on Spriggs pursuant to Coors plan for the distribution of beer to all of its wholesalers in the eleven states in which Coors beer was marketed." (at page 6.)

Similarly, Coors had previously asserted to the Court of Appeal:

> "The territorial restriction challenged by Spriggs in its antitrust claim is contained in contracts between Coors and its distributors in eleven states [C.T. 172-73; R.T. 345-46, 488]. The multistate aspects of the question of exclusive territories for distributors is further evidenced by the decision of the Federal Trade Commission to file a complaint challenging these provisions [C.T. 183]." (Respondent's Brief, 2nd Civil No. 40228, pp. 15, 16.)

The Brewery's current version of its multi-state distribution system as a non-related, dissimilar operation finds no evidentiary support in the record, nor in Coors' own words.

* * *

APPENDIX A.

In this Appendix we have extracted the following from the opinions of the Court of Appeals in *Spriggs,* and the Federal Circuit Courts of Appeal in *F.T.C.* and *Copper Liquor.*

The *Spriggs* trial record, the Court of Appeals points out at Appendix, pages 2-5, "established":

> ". . . the economic dominance of Coors in its relationship with its distributors."
>
> ". . . The situation was tailored for Coors' wishes to become the distributors' command."
>
> ". . . Each distributorship contained strict territorial restrictions . . ."
>
> ". . . It is quite clear from the record that they made it easier for Coors to monitor both wholesale and retail prices."
>
> "A policy memorandum . . . admitted to be relevant at all times contained the following instructions to its distributors: 'In order to maintain a successful wholesale or retail business, pricing integrity is essential. Pricing integrity will result in adequate and equitable profit to both the distributor and retailer and is fair to the ultimate consumer.' "
>
> ". . The record indicates that Coors was not just interested in minimum pricing but in price fixing."
>
> "Both wholesale and retail profit margins were 'suggested' at such levels that both the distributor and retailer got a 'fair return' if they ran a 'tight ship'. Coors' philosophy was that it was in partnership with the distributors and retailers and if any one of the three partners got out of step 'the castle would come tumbling down.' "[4]

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[4]Coors' concept of "pricing integrity" expressed in terms of "fair return" if the distributors ran a "tight ship", and the "partnership", and the consequences "if any of the partners got out of step", was elicited as testimonial evidence given by William Coors, its president, at each of the trials in which he testified—*F.T.C., Copper Liquor,* and *Spriggs.* (See R.T. 338-341, 358-359.)

". . . Coors' pricing policy was enforced by its representatives who went around to the distributors to discuss wholesale prices with them."

"According to one Barnhardt, Coors' vice president of sales . . . everything is on a one price basis. We do not appreciate our distributors rebating or discounting in any fashion."

". . . It is our experience that all of those (distributors) that are still representing us do comply with our policies. We feel that way or they wouldn't be representing us."

In *Copper Liquor*, the court determined:

"Coors enters into distributorship agreements for certain geographical territory . . ."

"Coors has such agreements with 160 distributors within its market area . . ."

"Coors limits its market area to the states of California, Arizona, Nevada, Utah, Idaho, Wyoming, Colorado, New Mexico, Kansas, Oklahoma, one-half Texas."

". . . without territorial restrictions imposed in the agreements it would be difficult if not impossible to maintain the efficiency of the distribution system."

". . . the distribution scheme assured that there would be no intrabrand competition."

"The company's right to terminate the distributorship without cause on short notice was a formidable one."

Coors believed that "intrabrand competition would" erode the firm's [Brewery] market penetration" and that "intrabrand competition among distributors would

primarily manifest itself in wholesale price competition and perhaps lower retail prices in competition in service."

". . . the territorial restrictions also play a vital role in Coors' maintaining control over the wholesale and retail prices of its beer."

". . . the vertically-imposed territorial restrictions were ancillary to price fixing . . . the fixing of prices at which others may sell is anti-competitive, and the unlawfulness of the price fixing infects the distribution restrictions."

In *F.T.C.* the Opinion recites:

"Coors has one brewery in Golden, Colorado, and distributes its beer in an eleven-state area. The beer is sold to the distributors who in turn sell to retailers."

Coors, a manufacturer, enters into an agreement with its distributors to distribute beer in the assigned territory only.

In *F.T.C.*, the Opinion describes the Coors distribution system, as in *Copper Liquor,* in detail and is even more explicit in its evidentiary references:

A [Brewery] representative is assigned to each distributor to "see that Coors' Policy Manual is followed."

"Coors policy is to establish pricing integrity which means that a certain profit is allowed on each level of resale."

The Brewery representatives tell distributors:

". . . the best thing for him to do is not to be a distributor if he could not agree to Coors' policies on pricing and territories . . ."

". . . bring his prices in line with Coors' recommendations or they would put another distributor in his area."

"Coors sent him the prices at which to sell Coors beer."

". . . [Coors] has pursued a policy of fixing, controlling and maintaining prices at which Coors beer is sold at both the wholesale and retail level, that in furtherance of this policy it has engaged in various acts and practices such as: suggested resale prices to both distributors and retailers, checking prices at which distributors and retailers sell Coors beer, advising distributors and retailers that it is contrary to Coors pricing policy for them to deviate from prices approved by respondent, threatening to terminate distributorships and threatening to force distributors to sell their businesses for refusing to adhere to suggested retail prices, entering into agreements and understandings with distributors as to the wholesale prices which the distributors will charge for Coors beer, joining with distributors in attempting to coerce retailers to refrain from selling Coors beer at prices below those approved by respondent, encouraging distributors to prevent retail price cutting by refusing to deliver Coors beer to price cutters, or to reduce the amount of beer delivered, and entering into agreements and understandings with retailers as to the retail prices or range of prices at which such retailers will sell Coors beer.

"There is substantial evidence in the record to support the Commission's findings." (F.T.C., at 1185-1186; C.T. 78, 79.)